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No. 238

In The

Supreme Court of the United States

October Term, 1960

H. A. Lott, Lee Blocker and Lorn D. Frazier,
Petitioners,

v.

The United States of America,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

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No. 238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals (R. 107-116) is reported at 280 F. 2d 24.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1960. The petition was filed on July 15, 1960, and was granted on October 10, 1960. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves U.S. Const. amends. V, VI; Int. Rev. Code of 1939, ch. 1, §§145(a), 145(b), 53 Stat. 62, as amended, 57 Stat. 144; Int. Rev. Code of 1954, ch. 75, §§7201, 7203, 7207, 68A Stat. 851, 853; Conspiracy Act, 62 Stat. 701, 18 U.S.C. §371; Act of June 25, 1948, 62 Stat. 967, as amended, 63 Stat. 105, 28 U.S.C. §2255; Fed. R. Crim. P. 2, 7(c), 11, 12(b)(2), 31(c), 32, 34, 35, 36, 37(a), 45(b). The foregoing constitutional provisions, statutes and rules are printed in the Appendix, *infra*, p. 57.

QUESTIONS PRESENTED

1. Whether a notice of appeal in a criminal case was timely filed under Rule 37(a)(2), Federal Rules of Criminal Procedure, wherein:

   (a) The notice of appeal was filed within 10 days after entry of the order denying a motion in arrest of judgment.

   (b) The motion in arrest of judgment was filed within 5 days after entry of the judgment.

   (c) A plea of *nolo contendere* was entered more than 10 days before the motion in arrest of judgment was filed.

2. Whether a short-form indictment purporting to charge individuals with attempting to evade corporate income taxes, and conspiracy to do so, is sufficient wherein:

   (a) The indictment does not charge that there was a deficiency in the payment of income taxes by the corporation.

   (b) The indictment does not charge that the accused had knowledge of any tax deficiency.

   (c) The indictment does not charge what part the accused individually had in the alleged attempt to evade corporate income taxes.

(d) The conspiracy count of the indictment does not charge all the basic elements of the substantive offense of attempted evasion of corporate income taxes.

3. Whether the District Court lost jurisdiction to convict Petitioners upon their pleas of *nolo contendere* and impose prison sentences wherein:

(a) After acceptance of the pleas of *nolo contendere* the District Court deferred sentencing and proceeded to hear a lengthy trial of other persons accused in the indictment.

(b) On the day of sentencing Petitioners the District Court obviously relied upon evidence adduced at the trial of the other persons accused in the indictment.

4. Whether imposition of prisn sentences for felony offenses (in excess of one year) was beyond the jurisdiction of the District Court wherein the written judgments adjudged that Petitioners were convicted of the misdemeanor offenses of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns."

STATEMENT OF THE CASE

The three Petitioners were convicted, fined and sentenced to imprisonment by the United States District Court for the Southern District of Texas, Houston Division, on the basis of a Federal grand jury indictment (R. 1-10) which purports to charge them, along with Richard A. Farnsworth, Sr., and Alan Farnsworth, in five counts. Counts 1 through 4 purport to charge a willful attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc. (a Texas corporation) for the years 1951 through 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 (Counts 1-3), and Section 7201 of the Internal Revenue Code of 1954

(Count 4). Count 5 purports to charge a conspiracy to willfully attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc., for the same years, in violation of 18 U.S.C. §371. Petitioners were employee-officers and minor stockholders (approximately 7% among them) of Farnsworth & Chambers Company, Inc. (R. 52; R.B. 111).[1] The controlling executives and major stockholders of the corporation were Dunbar N. Chambers (now deceased) and Richard A. Farnsworth, Sr. and his son, who owned approximately 74% of the stock among them (R.B. 111).

Following return of the indictment, Petitioners were arraigned on April 24, 1958, and pleaded "not guilty" (R. 11). Thereafter, all three Petitioners filed motions for bill of particulars and for severance from the other defendants and separate trials, and two Petitioners filed a motion to dismiss the indictment (R. 15). All of these motions were denied by the District Court (R. 15). Before action was taken on the motions the Government had voluntarily filed a "bill of particulars" (R. 11) and in response thereto two Petitioners filed a motion for supplemental bill of particulars (R. 13), which was also denied (R. 15).

After denial of all their pre-trial motions, Petitioners requested permission to be rearraigned for the purpose of entering pleas of *nolo contendere* (R. 16, 29-30). Acceptance of the pleas was vigorously opposed by the Government (R. 16-17, 30), but they were accepted by the District Court. The pleas of *nolo contendere* were entered on March 17, 1959, by Petitioners Blocker and Frazier (R. 29), and on March 20, 1959, by Petitioner Lott (R. 41).

After accepting such pleas, the District Court deferred sentencing and the same judge presided at the trial of

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[1] Pursuant to stipulation filed herein, a few references will be made to portions of the record which were not reprinted, in order to support certain items of background information. Such references will be designated "R.B."

Richard A. Farnsworth, Sr., and Alan Farnsworth under the indictment (R. 107). This jury trial commenced on April 6, 1959, and lasted until June 9, 1959 — consuming nearly 10 weeks (R. 59). Alan Farnsworth was acquitted on all counts and the jury was unable to agree upon a verdict as to Richard A. Farnsworth, Sr. (R. 107).

On June 19, 1959, following the Farnsworth trial, the District Court (with the same judge still presiding) called Petitioners before it for sentencing (R. 41). During the sentencing proceedings repeated references were made to evidence adduced at the Farnsworth trial (R. 42, 46, 51, 59). Petitioners were orally sentenced to serve terms of imprisonment on each count (to run concurrently), 3 years in the case of Blocker and 2 years each in the cases of Lott and Frazier, and each of the three was fined $20,000 (R. 60-61). The written judgments were filed on June 22, 1959; they adjudge Petitioners guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns," although they refer to the statutes set out in the indictment (R. 61-66).

On June 23, 1959, Petitioner Lott filed a motion denominated "motion in arrest of judgment", which prayed "that the judgment and sentence with respect to him be arrested and set aside, that the indictment against him be dismissed, and that he be granted such other relief as justice may demand" (R. 66-67). On the same day Petitioners Blocker and Frazier filed a "motion in arrest of judgment" praying for identical relief (R. 68-70). Orders denying the motions in arrest of judgment were entered on July 13, 1959 (R. 72). Petitioners filed motions for reduction and suspension of sentence or probation (R. 72, 83) which were also denied (R. 75-76). Petitioner Lott filed notice of appeal to the Court of Appeals on July 15, 1959 (R. 74). Petitioners Blocker and Frazier filed notice of appeal on July 17, 1959 (R. 80).

The divided Court of Appeals below entered judgment dismissing the appeals for want of jurisdiction on June 20, 1960, upon the ground that its jurisdiction had not been invoked by timely notices of appeal (R. 116, 117). Questions going to the merits of the appeals were not reached (R. 108). The majority held that the motions in arrest of judgment — filed well within 5 days after entry of the judgments — were not effective to toll the time for giving notice of appeal under Rule 37(a)(2)[2] because such motions were not filed within 5 days after entry of the *nolo contendere* pleas. Acceptance of the *nolo contendere* pleas was construed to be a "determination of guilt" within the meaning of Rule 34.

SUMMARY OF ARGUMENT

I.

1. Under the plain terms of Rule 37(a)(2) the notices of appeal were timely filed. It explicitly provides that, if a motion in arrest of judgment has been made within the 10-day period following entry of judgment, appeal from the judgment may be taken within 10 days after entry of the order denying the motion. The instant appeals were taken strictly in accordance with Rule 37(a)(2), as follows:

June 19	Sentences pronounced (written judgments entered June 22).
June 23	Motions in arrest filed.
July 13	Orders denying motions entered.
July 15 & 17	Notices of appeal filed.

Rule 37(a)(2) does not require that a motion in arrest of judgment be filed within the time prescribed by Rule 34 in order to toll the time for appeal. Rule 34 has nothing to do with the time for appeal. Rule 37(a)(2) is headed up

[2] All references to Rules are to the Federal Rules of Criminal Procedure, unless otherwise stated.

"Time for Taking Appeal" and it is the only rule which bears upon the timeliness of an appeal. Justice requires that appellants in criminal cases be entitled to rely upon the unambiguous terms of Rule 37(a)(2). The decision below is wrong — it reduces the rule to a virtual trap. (Full argument, *infra*, pp. 11-16.)

2. Even if so required, the motions in arrest of judgment were timely filed under Rule 34. It states that motions in arrest shall be filed "within 5 days after determination of guilt." Although Petitioners pleaded *nolo contendere* on March 17 and 20, that was not a determination of guilt. There was no conceivable "determination of guilt" until June 19 when the judge found Petitioners guilty and pronounced sentence. Motions in arrest of judgment were filed well within 5 days thereafter, on June 23. The very word "determination" implies finality — the termination of a proceeding — and a case does not terminate until judgment is entered. *Nolo contendere* is a plea to the court that "I will not contest." It is not an admission of guilt and it cannot be deemed a "determination" of guilt. Under Rule 32(d) the *nolo contendere* pleas might have been withdrawn before sentence was imposed, so in no sense may such pleas be impressed with the finality of a "determination" of guilt. (Full argument, *infra*, pp. 17-20.)

3. In *Sullivan* v. *United States*, 212 F. 2d 125 (10 Cir. 1954), *aff'd* 348 U.S. 170 (1954), this Court and the Court of Appeals exercised jurisdiction over the appeal under jurisdictional facts virtually identical to those in this case. Presumably, it was determined that jurisdiction was present. (Full argument, *infra*, p. 21.)

4. Rule 12(b)(2) provides that "lack of jurisdiction or the failure of the indictment or information to charge an

offense shall be noticed by the court at any time during the pendency of the proceeding." Petitioners' alternative position is that the "motions in arrest of judgment" qualified as motions under Rule 12(b)(2), and should be so regarded. It is clear that they were timely filed during the "pendency of the proceeding." The notices of appeal were filed well within 10 days following entry of the order denying the motions, and fairness requires that the appeals be regarded as having been taken from the denial of such motions. (Full argument, *infra*, pp. 21-23.)

5. In the further alternative, Petitioners contend that the "motions in arrest of judgment" should be treated as motions to vacate sentences under 28 U.S.C. §2255. *Marteney* v. *United States*, 216 F. 2d 760 (10 Cir. 1954), is an exact precedent for such treatment. If there were no timely appeals from the judgments, Petitioners' freedom under bail would be unauthorized and they should be regarded as "in custody" for purposes of §2255. The notices of appeal were filed well within 10 days after denial of the constructive §2255 motions and thus were timely. (Full argument, *infra*, pp. 23-25.)

II.

1. The indictment is not sufficient to charge the offenses of willfully attempting to evade corporate income taxes and conspiracy to do so. In order to be valid an indictment must directly and expressly charge every element of the offense — this is a fundamental principle. A charge in the language of the statute is not sufficient when the statute omits essential elements of the offense. It is well established that two essential elements of the offense of attempted tax evasion defined by §145(b), I.R.C. 1939, and §7201, I.R.C. 1954, are (1) existence of a tax deficiency (this is the *corpus delicti*), and (2) knowledge of the exis-

tence of a tax deficiency. These basic elements of the offense do not appear in the statute and they are not directly and expressly charged in the indictment. Since the law clearly requires that such elements of the offense be directly charged, the indictment is fatally defective. Indeed, it is very difficult to see how these elements are charged at all, by implication or otherwise. A charge by implication would not salvage the indictment. Such elements could not possibly be said to be charged in the conspiracy count — not even by implication. An indictment for conspiracy is required to set out the essential elements of the substantive offense which is the alleged object of the conspiracy. All counts of this short-form indictment fail to charge offenses against the United States. It should be dismissed. (Full argument, *infra*, pp. 25-34.)

2. In addition, under the circumstances, the indictment fails to inform the accused of the "nature and cause of the accusation" within the meaning of the Sixth Amendment. Petitioners are accused of attempting to evade taxes of a rather large corporation of which they were employees and very minor stockholders. The vague and general allegations of the indictment are grossly insufficient, as a practical matter, to inform Petitioners of the charge or enable them to prepare to defend against it. It is not shown how any of the acts alleged might have caused the corporation to underpay its taxes. No facts are set out which would prove the recited falsity of the corporate tax returns. Five individuals are accused in the same indictment, but no one accused is informed as to the charges against him individually. While such a short-form indictment might possibly be deemed sufficient to charge *individuals* with attempting to evade *their own personal* income taxes, it is manifestly insufficient to reasonably charge employees of varying responsibilities with attempting to defeat taxes imposed upon a *corporation*. (Full argument, *infra*, pp. 34-38.)

III.

Petitioners submit that the record shows that they were convicted and sentenced on the basis of evidence adduced at the 10-week long trial of the Farnsworths, who were jointly indicted with Petitioners. This trial occurred during the 3 months following entry of the *nolo contendere* pleas by Petitioners and preceding pronouncement of judgment and sentences. Petitioners were actually tried *in absentia*, without benefit of cross-examination or rebuttal evidence, and without a jury. The convictions and sentences were obtained in a manner which departed sharply from normal and customary procedure.

Under the circumstances there was an "unreasonable delay" in imposing sentence, in violation of Rule 32(a). Furthermore, the conduct of the District Court in making an adjudication of guilt on the basis of the Farnsworth trial evidence constituted a rejection of the pleas of *nolo contendere*, as a matter of law. See *Tucker* v. *United States*, 196 Fed. 260, 267-268 (7 Cir. 1912). Although there is considerable doubt and conflict as to the meaning and effect of *nolo contendere*, its historical origin and the studied decisions show that it is not a plea to the indictment but is an agreement between the court and the accused, authorizing judgment and sentence, based upon public policy considerations. The plea does not authorize a trial by the court sitting without a jury. In this case the plea was abused and, in effect, rejected. No plea being outstanding, the District Court had no jurisdiction to convict and sentence Petitioners as it did. At the very least, Petitioners should be permitted to replead to the indictment. (Full argument, *infra*, pp. 39-53.)

IV.

The indictment purported to charge Petitioners with the felonies of willfully attempting to evade *corporate* taxes, and conspiracy to do so, and the District Court orally pronounced that they were guilty of such offenses. However, the *written judgments* adjudge Petitioners guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns." The language first quoted describes the misdemeanor offense proscribed by §7203 and 7207, I.R.C. 1954, and 145(a), I.R.C. 1939. These misdemeanors appear to be lesser offenses included within the felony charges. Under 18 U.S.C. §371, conspiracy to commit a misdemeanor subjects the offender to no more than the maximum punishment provided for the misdemeanor. Therefore, under the written judgments, it seems that Petitioners stand convicted of misdemeanor offenses and that the sentences are excessive to the extent that they exceed imprisonment for 1 year. (Full argument, *infra*, pp. 53-55.)

ARGUMENT

I.

The notices of appeal were timely filed under Rule 37(a)(2) because:

1. The notices of appeal were filed within the time limits plainly prescribed by Rule 37(a)(2).
2. Even if so required, the motions in arrest of judgment were timely filed under Rule 34.
3. In *Sullivan* v. *United States* this Court exercised jurisdiction under facts identical to these.
4. In the alternative, the motions in arrest of judgment should be construed as motions under Rule 12(b)(2), and the appeals should be regarded as having been taken from the denial of such motions.

5. In the further alternative, the motions in arrest of judgment should be construed as motions to vacate sentences under 28 U.S.C. §2255, and the appeals should be regarded as having been taken from the denial of such motions.

1. The notices of appeal were filed within the time limits plainly prescribed by Rule 37(a)(2).

Since several dates are of critical importance in considering this case, they are set out below in chronological order:

March 17, 1959	Rearraignment and entry of *nolo contendere* pleas by Petitioners Blocker and Frazier (R. 29).
March 20, 1959	Rearraignment and entry of *nolo contendere* plea by Petitioner Lott (R. 41).
June 19, 1959	Sentencing of all Petitioners in open court (R. 60-61).
June 22, 1959	Judgment and commitment as to each Petitioner filed (R. 61-66).
June 23, 1959	Motions in arrest of judgment filed by all Petitioners (R. 66, 68).
July 13, 1959	Orders denying the motions in arrest of judgment of all Petitioners entered (R. 72).
July 15, 1959	Notice of appeal filed by Petitioner Lott (R. 74).
July 17, 1959	Notice of appeal filed by Petitioners Blocker and Frazier (R. 80).

Petitioners' primary contention is that the notices of appeal were timely filed because they were filed within the time prescribed by the clear, explicit and unambiguous terms of Rule 37(a)(2). That rule provides in pertinent part as follows:

> "(2) **Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. . . ."

The undisputed record shows (1) that Petitioners filed motions in arrest of judgment well "within the 10-day period" following entry of the judgment, and (2) that Petitioners filed their notices of appeal well "within 10 days after entry of the order[s] denying the motion[s]" in arrest of judgment. See table above. Therefore, under the plain terms of Rule 37(a)(2) the notices of appeal were timely filed. However, the court below held that the motions in arrest of judgment were not timely filed under *Rule 34* and — for that reason — held that the longer time for appeal provided in Rule 37(a)(2) was not applicable. In so holding, the court below went directly contrary to the decisions in *Lujan* v. *United States*, 204 F. 2d 171 (10 Cir. 1953), and *Smith* v. *United States*, 273 F. 2d 462 (10 Cir. 1959), *cert. den.* 363 U.S. 846. It relied upon the holding in *United States* v. *Bertone*, 249 F. 2d 156 (3 Cir. 1957), and dictum in other cases.[3]

The real question is: Does Rule 37(a)(2) mean what it plainly says? It explicitly states that the longer time for appeal applies "if a motion for a new trial or in arrest of judgment has been made within the 10-day period" following entry of judgment. Rule 37(a)(2) does not state that

[3] O'Neal v. United States, 264 F. 2d 809, vacated 272 F. 2d 412 (5 Cir. 1959); Marion v. United States, 171 F. 2d 185 (9 Cir. 1948), cert. den. 337 U.S. 944. *See also*, Drown v. United States, 198 F. 2d 999 (9 Cir. 1952), cert. den. 344 U.S. 920; Pugh v. United States, 197 F. 2d 509 (9 Cir. 1952); Godwin v. United States, 185 F. 2d 411 (8 Cir. 1950).

the motion must be timely under Rule 34, or have any other quality — it requires only "*a motion* . . . in arrest of judgment." (Emphasis supplied.)

We submit that the court below clearly erred in looking to the timeliness of the motions in arrest of judgment under Rule 34. That rule does not pretend to exert any impact upon the time for filing of the notice of appeal. Rule 37 — not 34 — relates to the time and manner for the taking of an appeal. Significantly, Rule 37 does not refer to a motion in arrest of judgment filed "within 5 days after determination of guilt" under Rule 34. It fails to contain any language indicating even by implication that it is limited to a motion seasonably filed under Rule 34. The sweep of Rule 37(a)(2) is to provide without condition or qualification that an appeal by a defendant may be taken within 10 days after entry of the judgment, and further that if a motion in arrest of judgment has been made within the 10-day period then an appeal from the judgment may be taken within 10 days after entry of the order denying the motion.

The decision below reduces Rule 37(a)(2) to a virtual trap. We respectfully submit that defendants in criminal cases and the bar should be able to rely upon the plain terms of the rule entitled "Time For Taking Appeal"— Rule 37(a)(2) — in order to determine the time for filing notice of appeal. Reference to other rules having nothing to do with the time for appeal should not be required. This is the only construction which is in accordance with the command of Rule 2 that:

> "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

(a) The history of Rule 37(a)(2) shows that the construction adopted by the court below is erroneous.

It is interesting to note that the construction adopted by the court below is in accordance with the terms of the Criminal Appeals Rules of 1933, 292 U.S. 661, which were superseded by the Federal Rules of Criminal Procedure. Old rule III — the counterpart of present Rule 37(a)(2) — provided in pertinent part as follows:

> "III. *Appeals.* An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made *within the time specified in subdivision (2) of Rule II*, the appeal may be taken within five (5) days after entry of the order denying the motion." 292 U.S. at 662. (Emphasis supplied.)

Old rule II(2) was the counterpart of present Rules 33 and 34.

What is now Rule 37(a)(2) underwent several draft changes before adoption. The First Preliminary Draft was similar to old rule III, providing as follows:

> "**(2) Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial has been made *seasonably*, an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion . . . ."[4]

The same is true with respect to the Second Preliminary Draft, which provided as follows:

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[4] Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, 1943, Appeal Rule then No. 35(a)(2), p. 152. (Emphasis supplied.)

"(2) **Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial is *then pending* an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion . . . ."[5]

It will be noted that neither old rule III, the First Preliminary Draft nor the Second Preliminary Draft provided that a motion in arrest of judgment would toll the time to file notice of appeal — the time was tolled only by a motion for a new trial. Not until the third and final draft was it provided that a motion in arrest of judgment would toll the time for appeal:

"(2) **Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion . . . ."[6]

More important, for present purposes, in the final draft the language of old rule III and the preliminary drafts indicating that a motion must be *seasonably* filed in order to toll the appeal time was deleted. This seems almost conclusively to show a deliberate intention (1) to eliminate any requirement that a motion for a new trial be timely filed under Rule 33 in order to toll the time for appeal under Rule 37(a)(2), and (2) not to require that a motion in arrest of judgment be timely filed under Rule 34 in order to toll the time for appeal under Rule 37(a)(2).

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[5] Federal Rules of Criminal Procedure, Second Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, February 1944, Appeal Rule then No. 39(a)(2), p. 135. (Emphasis supplied.)

[6] Federal Rules of Criminal Procedure, Report of the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, June 1944, Appeal Rule then No. 39(a)(2), p. 37.

2. Even if so required, the motions in arrest of judgment were timely filed under Rule 34:

(a) Entry of the pleas of nolo contendere did not constitute a "determination of guilt" within the meaning of Rule 34.

The court below held that under Rule 34 a "determination of guilt" was made when Petitioners' pleas of *nolo contendere* were tendered to and accepted by the court (R. 112). This, we believe, was error — neither the rule nor reason supports such result. This is a case of first impression.

The pertinent part of Rule 34 now reads as follows:

> ". . . The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period."

Its history offers no support for the decision below. Prior to adoption of the Federal Rules of Criminal Procedure, Rule II(2) of the Criminal Appeals Rules of 1933, 292 U.S. 661, 662, the forerunner of Rule 34, provided:

> "(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt."

The present Rule 34 underwent several draft changes before adoption. The First Preliminary Draft provided in pertinent part as follows:

> ". . . The motion in arrest of judgment shall be made within 3 days after verdict or finding of guilt or within such further time as the court may fix during the 3-day period."[7]

[7] Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, 1943, Appeal Rule then No. 31(d), p. 134.

The Second Preliminary Draft is the same except the time is changed from 3 to 5 days:

> ". . . The motion in arrest of judgment shall be made within 5 days after verdict or finding of guilt or within such further time as the court may fix during the 5-day period."[8]

Not until the third and final draft was the phrase "after verdict or finding of guilt" changed to "after determination of guilt":

> ". . . The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period."[9]

"Determination", in legal parlance, means, "The decision of a court of justice. It implies an ending or finality, the ending of a controversy or suit." Black, *Law Dictionary* 536 (4th ed. 1951). A criminal action is terminated by the final judgment entered. *Phillips* v. *United States*, 212 F. 2d 327, 335 (8 Cir. 1954). In this case no action which could reasonably be construed as either a "finding of guilt" or a "determination of guilt" was taken until June 19, 1959, when the court pronounced its judgment, stating (R. 60):

> "I have found each [defendant] guilty of the felonies as contained in the Grand Jury indictment."

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[8] Federal Rules of Criminal Procedure, Second Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office. February 1944, Appeal Rule then No. 36, p. 131.

[9] Federal Rules of Criminal Procedure, Report of the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office. June 1944, Appeal Rule then No. 36, p. 35.

The written judgments were entered June 22 (R. 61-66). Whether the "determination of guilt" be regarded as having taken place on June 19 or on June 22, Petitioners' motions to arrest judgment were filed within the 5 days prescribed by Rule 34, since they were filed on June 23 (R. 66, 68).

Acceptance of a plea of *nolo contendere* should not constitute a determination of guilt. As demonstrated under Point III (*infra*, p. 39), *nolo contendere* is not in essence or historical development a plea to the indictment at all, but rather a plea to the court — an offer not to contend with the charges brought by the Government. As this Court held in *United States* v. *Norris*, 281 U.S. 619, 623 (1930), so long as the plea of *nolo contendere* remains of record no issue of fact exists or can be made to exist under the indictment. Certainly the issue of guilt is one arising under the indictment. But since technically the plea of *nolo contendere* is not a plea to the indictment, there is no basis for saying that acceptance of that plea constitutes a "determination of guilt." To the contrary, the only "determination" involved in the court's acceptance of a defendant's plea of *nolo contendere* is a determination that the demands of public policy and the requirements of justice can be satisfied by disposition of the case without contest or adjudication of issues arising under the indictment. *United States* v. *Standard Ultramarine & Color Co.*, 137 F. Supp. 167 (S.D. N.Y. 1955).

We submit that the only logical construction of the rules as a whole is to interpret the phrase "determination of guilt" as used in Rule 34 to mean "entry of judgment" in a *nolo contendere* case. Any other construction leads to absurd results. Under the holding of the court below, a defendant would be put in the ridiculous position of having to move to arrest a judgment not yet in existence, and having to file an appeal when the judgment, ultimately entered, might be entirely acceptable to him. It certainly would seem illogical

to regard entry of the plea as a determination in view of the fact that, with the consent of the court, the plea might be withdrawn at any time before sentence is imposed. Fed. R. Crim. P. 32(d).

Under the holding below, what should, or what could Petitioners have done? Would it have been reasonable for them to have filed their motions in arrest of judgment by March 22, 1959 (5 days after entry of *nolo contendere* pleas), when they were waiting to be sentenced 3 months later? Suppose they had done so, and the motions had been promptly denied. Would they have been required by Rule 37(a)(2) to file notice of appeal within 10 days thereafter, still nearly 3 months before entry of judgment? Or, suppose that the motion to arrest judgment was carried along and not overruled until after entry of judgment. Then, although the motion was pending, it would not have been filed "within the 10-day period" after entry of judgment according to the terms of Rule 37(a)(2), and Petitioners would have been in the incongruous position of having to appeal from the judgment (within 10 days after its entry) although the motion might have been granted later and the judgment arrested.

To require a defendant who is awaiting sentence after a plea of *nolo contendere* to move in arrest of judgment within 5 days after entry of the plea, is to deny him the right to so move. In view of the pre-sentence investigation procedure, and as a matter of common experience, entry of the plea will practically always precede the sentencing by more than 5 days. The fair and logical construction of the rules is that the "determination of guilt" does not occur until judgment is entered. Certainly this should be so for the purpose of determining the timeliness of appeals. The holding of the court below reduces Rule 34 to a virtual trap in a *nolo contendere* case.

3. In Sullivan v. United States this Court exercised jurisdiction under facts identical to these.

Jurisdictional facts identical in all material respects to those in the instant case were presented in *Sullivan* v. *United States*, 212 F. 2d 125 (10 Cir. 1954), *aff'd* 348 U.S. 170 (1954). The defendant entered a plea of *nolo contendere* on April 8, 1953, was sentenced on May 26, and filed a motion in arrest of judgment on May 29; the motion in arrest of judgment was denied after June 23, and within 10 days thereafter the notice of appeal was filed. Both the Court of Appeals for the Tenth Circuit and this Court exercised jurisdiction over the appeal. Presumably, the Court of Appeals determined that it had jurisdiction, in accordance with its previous decision in *Lujan* v. *United States*, 204 F. 2d 171 (10 Cir. 1953). It also seems fair to presume that this Court considered its jurisdiction and determined that it had jurisdiction — under the plain language of Rule 37(a)(2). We respectfully submit that the same decision should be made in this case, on the basis of both the plain words of Rule 37(a)(2) and the precedent of *Sullivan*.

4. In the alternative, the motions in arrest of judgment should be construed as motions under Rule 12(b)(2), and the appeals should be regarded as having been taken from the denial of such motions.

Even if the court below were correct in its holding that the appeals from entry of the judgments were not timely taken, it nevertheless had jurisdiction to notice and relieve the failure of the indictment to charge an offense and the consequent lack of jurisdiction in the District Court to enter judgment. Rule 12(b)(2) provides in part as follows:

"... Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be

noticed by the court at any time during the pendency of the proceeding."

The judgments were entered on June 22, 1959 (R. 61-66). The next day Petitioners filed motions denominated "motion in arrest of judgment" (R. 66, 68). Unquestionably, these motions were filed "during the pendency of the proceeding" within the meaning of Rule 12(b)(2) since — by any construction — the time to file notice of appeal could not have expired until 9 days after they were filed. Furthermore, the motions alleged as grounds that "The indictment does not state facts sufficient to constitute an offense against the United States" (R. 66, 68), coming precisely within the terms of Rule 12(b)(2). Thus, it is clear that the District Court had jurisdiction to consider and to grant the motions under Rule 12(b)(2) — even if they were not timely under Rule 34. *Finn* v. *United States*, 256 F. 2d 304, 306 (4 Cir. 1958); *United States* v. *Holmes*, 110 F. Supp. 233, 234 (S.D. Tex. 1953); see *Hotch v. United States*, 208 F. 2d 244, 250 (9 Cir. 1953).

Orders denying the "motions in arrest of judgment" were entered on July 13, 1959 (R. 72). Since the judgments had previously been entered (R. 61-66), it seems clear beyond doubt that the orders denying the motions were appealable. Cf. *Ekberg* v. *United States*, 167 F. 2d 380, 384 (1 Cir. 1948); *United States* v. *Quon*, 241 F. 2d 161, 163 (2 Cir. 1957), *cert. den.* 354 U.S. 913; *Sutton* v. *United States*, 157 F. 2d 661, 668 (5 Cir. 1946). Notices of appeal were filed well within 10 days after entry of the orders (R. 74, 80). In fairness and justice, the appeals should be regarded as having been taken from the orders denying the motions — even though the notices of appeal did not expressly refer to the orders.

A holding that the notices of appeal were ineffective to constitute appeals from the orders denying the "motions in arrest of judgment" would go directly contrary to the

spirit of the Federal Rules of Criminal Procedure — as intended, construed and applied. In a number of instances, documents which did not even purport to be notices of appeal have been held to be effective as such.[10]

In summary, we respectfully submit, in the alternative, that the "motions in arrest of judgment" should be construed as motions under Rule 12(b)(2) and the appeals should be regarded as having been taken from the orders denying the motions as so construed. Our position in this regard was apparently misconstrued by the court below. In the brief paragraph of its opinion which was apparently intended to deal with this point (R. 113-114), it did not even refer to Rule 12(b)(2), the basis for our contention.

5. In the further alternative, the motions in arrest of judgment should be construed as motions to vacate sentences under 28 U.S.C. §2255, and the appeals should be regarded as having been taken from the denial of such motions.

If the court below were correct in holding that there was no timely appeal from the judgments, it should have reached the merits by viewing the "motions in arrest of judgment" as motions to vacate sentences under 28 U.S.C. §2255. These motions expressly prayed that the sentences be set aside, and also requested "such other relief as justice may demand" (R. 67, 70). An exact precedent for such treatment is found in *Marteney* v. *United States*, 216 F. 2d 760 (10 Cir. 1954). In that case the appellants filed motions to arrest judgment after judgment and sentence, but it was held that

[10] *E.g.*, O'Neal v. United States, 272 F. 2d 412 (5 Cir. 1959) — appeal bond; Black v. United States, 269 F. 2d 38 (9 Cir. 1959), cert. den. 361 U.S. 538 — application for leave to appeal in forma pauperis; Jordan v. United States, 233 F. 2d 362 (D.C. Cir. 1956), rev'd mem. other grounds 352 U.S. 904 (1956) — petition for writ of mandamus.

the motions were filed too late under Rule 34. However, the motions to arrest judgment were treated as motions to vacate under 28 U.S.C. §2255, and the judgments were reversed because of the failure of the indictment to state an offense. The rationale is succinctly set out in the opinion of the Court of Appeals, 216 F. 2d at 762:

> "The 'motions in arrest of judgment', having been filed more than five days after determination of guilt, were untimely under Rule 34 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., and the government takes the preliminary position that the trial court was without authority to treat the pleadings as motions to vacate under Section 2255 for the purpose of considering the legal questions raised by the motions. Section 2255 specifically authorizes 'A prisoner in custody under sentence of a court * * * claiming * * * that the court was without jurisdiction to impose such sentence * * * may move the court which imposed the sentence to vacate, set aside or correct the sentence * * * at any time.' Treated as motions to vacate, the pleadings were undoubtedly timely to challenge the legal sufficiency of the counts in the indictment to state a federal offense. Having in mind that it is the content of the pleadings and not the label which determines their nature and effect, we can see no impropriety in the court's treatment of the pleadings as motions to vacate under Section 2255."

Accord, *Finn* v. *United States*, 256 F. 2d 304 (4 Cir. 1958).

It appears that a person must be "in custody under sentence of a court" in order to be entitled to relief under 28 U.S.C. §2255.[11] However, if it were determined that no timely appeal was taken Petitioners would not be entitled to be at liberty on bail, and they should be regarded as "in

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[11] See concurring opinion of a majority of this Court in Heflin v. United States, 358 U.S. 415, 420-422 (1959).

custody" for purposes of Section 2255. *Black* v. *United States*, 269 F. 2d 38, 41 (9 Cir. 1959), *cert. den.* 361 U.S. 938. Furthermore, in any event it would be well for this Court to review the merits under Section 2255 in order to avoid circuity of actions, as suggested by the court below (R. 116). Cf. *Heflin* v. *United States*, 358 U.S. 415, 418 n.7 (1959).

Although it is difficult to determine the exact ground upon which the court below rejected Petitioners' request for relief under 28 U.S.C. §2255, in the alternative, it appears that the controlling factor was the failure of the notices of appeal (R. 74, 80) to expressly refer to the orders denying the "motions in arrest of judgment." As we pointed out under the previous point (*supra*, pp. 22-23), this represents a hyper-technical construction of Rule 37(a)(1) which is wholly out of harmony with the spirit of the Federal Rules of Criminal Procedure.

II.

The indictment is insufficient because:

1. The indictment does not charge all the basic elements of the offense of attempted tax evasion.
2. The indictment wholly fails to apprise the accused *employees* of "the nature and cause of the accusation" of attempted evasion of *corporate* income taxes within the meaning of the Sixth Amendment.

Introduction

While a number of decisions of the courts of appeals have upheld indictments for attempted income tax evasion,[12] some of which contained language similar to that appearing in the indictment here in question (R. 1-10), none of the cases found involved defendants accused only of attempting to evade taxes imposed upon a *corporation*.[13] Thus, such decisions are distinguishable. Furthermore, it appears that the courts of appeals erroneously assumed that indictments for attempted tax evasion are within the general rule that "an indictment or information in the language of a statute ordinarily is sufficient. . . ." *Babb* v. *United States*, 218 F. 2d 538, 539 (5 Cir. 1955). Quite to the contrary, such indictments are within the exception pertaining when the words of the statute do not contain all the essential elements of the offense. "[I]f the statute omits

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[12] Janko v. United States, 281 F. 2d 156 (8 Cir. 1960); United States v. Hoover, 233 F. 2d 870 (3 Cir. 1956), cert. den. 352 U.S. 840; Elwert v. United States, 231 F. 2d 928 (9 Cir. 1956); United States v. Tadio, 223 F. 2d 759 (2 Cir. 1955), cert. den. 350 U.S. 874; Samish v. United States, 223 F. 2d 358 (9 Cir. 1955), cert. den. 350 U.S. 848; Legatos v. United States, 222 F. 2d 678 (9 Cir. 1955); Gariepy v. United States, 220 F. 2d 252 (6 Cir. 1955), cert. den. 350 U.S. 825; Heasley v. United States, 218 F. 2d 86 (8 Cir. 1955), cert. den. 350 U. S. 882; Pollock v. United States, 202 F. 2d 281 (5 Cir. 1953), cert. den. 345 U.S. 993; Gariepy v. United States, 189 F. 2d 459 (6 Cir. 1951); United States v. Rosenblum, 176 F. 2d 321 (7 Cir. 1949), cert. den. 338 U.S. 893; Himmelfarb v. United States, 175 F. 2d 924 (9 Cir. 1949), cert. den. 338 U.S. 860; Cave v. United States, 159 F. 2d 464 (8 Cir. 1947), cert. den. 331 U.S. 847; Rose v. United States, 128 F. 2d 622 (10 Cir. 1942), cert. den. 317 U.S. 651; United States v. Skidmore, 123 F. 2d 604 (7 Cir. 1941), cert. den. 315 U.S. 800; Capone v. United States, 56 F. 2d 927 (7 Cir. 1932), cert. den. 287 U.S. 553. *Contra*, Anderson v. United States, 11 F. 2d 938 (7 Cir. 1926).

[13] In Tinkoff v. United States, 86 F. 2d 868 (7 Cir. 1936), cert. den. 301 U.S. 689, it appears that the only holding was that the Court of Appeals had no jurisdiction over the appeal, p. 875.

an essential element, the indictment must supply it with certainty." *Babb v. United States, supra.*

1. The indictment does not charge all the basic elements of the offense of attempted tax evasion.

Of course, an indictment is fatally defective if it does not set forth every element of the offense sought to be charged. *United States* v. *Debrow*, 346 U.S. 374, 376 (1953); *Hagner* v. *United States*, 285 U.S. 427, 431 (1932); *Pettibone* v. *United States*, 148 U.S. 197, 202 (1893). This is a constitutional requirement, not a mere technicality of pleading subject to change by statute, court rule or decision. *United States* v. *Cruikshank*, 92 U.S. 542, 557 (1876); *Asgill* v. *United States*, 60 F. 2d 780, 784 (4 Cir. 1932).

The principle that an indictment must charge every essential element of the offense is not affected by the Federal Rules of Criminal Procedure. Such requirement is expressly recognized in Rule 7(c), which states that "the indictment or the information shall be a plain, concise and definite written statement of the *essential facts* constituting the offense charged." (Emphasis supplied.) As succinctly held in *United States* v. *Calhoun*, 257 F. 2d 673, 680 (7 Cir. 1958):

> ". . . The core of this reversible error is the omission, not the class of omission. U.S. Const. Amend. VI. Rule 7, Federal Rules of Criminal Procedure, 18 U.S.C. is unavailing in this situation and the failure to challenge the indictment at the trial level is unimportant, on this record, because count 5 omitted an element of the offense. . . ."

Furthermore, every element must be set forth fully, directly and expressly, without any uncertainty or ambiguity. *Evans* v. *United States*, 153 U.S. 584, 587 (1894); *Orglas* v. *United States*, 236 F. 2d 392, 393 (9 Cir. 1956). This is particularly essential when, as in the present case,

the language of the statute does not contain all elements of the offense. *Meer* v. *United States*, 235 F. 2d 65, 67 (10 Cir. 1956). As held by this Court in *Blitz* v. *United States*, 153 U.S. 308, 315 (1894):

> ". . . The general rule that an indictment for an offence purely statutory is sufficient if it pursues substantially the words of the statute, is subject to the qualification, fundamental in the law of criminal procedure, 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar to any subsequent prosecution for the same offence.' *United States* v. *Simmons*, 96 U.S. 360, 362; *United States* v. *Hess*, 124 U.S. 483, 488. As said in *United States v. Carll*, 105 U.S. 611, 612, it is not sufficient to set forth the offence in the words of the statute, 'unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' "

Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954 do not expressly set forth all essential elements of the offense of attempting to evade or defeat a tax. The specific elements lacking are:

1. Existence of a tax deficiency; and
2. Knowledge by the accused of such deficiency.

(a) The substantive counts fail to charge that there was a tax deficiency.

It is well settled that existence of a tax deficiency, *i.e.*, underpayment of the tax, is an essential element of the offense of attempted tax evasion. It was so held in *Small* v. *United States*, 255 F. 2d 604, 606 (1 Cir. 1958): "[O]ne of

the basic elements of the offense is an understatement of tax. . . ." The principle was recognized by this court in *Lawn* v. *United States*, 355 U.S. 339, 361 (1958), wherein it was stated: "While, of course, a conviction upon a charge of attempting to evade assessment of income taxes by the filing of a fraudulent return cannot stand in the absence of proof of a deficiency. . . ." Many other cases support the proposition that existence of a tax deficiency is an essential element of the offense.[14] All these decisions concern the necessity that the evidence prove the element of a tax deficiency in order for a conviction to stand, but they are equally applicable to the requisites of an indictment. Existence of a tax deficiency is the very *corpus delicti*. Unless there is a tax due and owing there can be no attempted evasion, and it necessarily follows that existence of such tax deficiency must be charged in the indictment.

Therefore, unless the indictment here in question (R. 1-10) can be construed to *directly and expressly* charge that there was a deficiency in the income taxes of the corporation, without any uncertainty or ambiguity, it is fatally defective. Manifestly, counts 1 through 4 do not so charge, either directly or by necessary implication. The only part of the indictment[15] which could conceivably be deemed to refer to a tax deficiency is the portion in which the *means* of the alleged attempt to evade and defeat taxes are set out. It is

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[14] *E.g.*, Jones v. United States, 282 F. 2d 745, 747 (4 Cir. 1960); Koontz v. United States, 277 F. 2d 53 (5 Cir. 1960); Holt v. United States, 272 F. 2d 272, 279 (9 Cir. 1959); United States v. Alker, 260 F. 2d 135, 140 (3 Cir. 1958), cert. den. 359 U.S. 906; Davis v. United States, 226 F. 2d 331, 334 (6 Cir. 1955), cert. den. 350 U.S. 965; United States v. Schenck, 126 F. 2d 702, 704 (2 Cir. 1942), cert. den. 316 U.S. 705; Gleckman v. United States, 80 F. 2d 394, 399 (8 Cir. 1935), cert. den. 297 U.S. 709.

[15] In discussing the language of the first four counts of the indictment, Count 1 will be referred to. Except for dates and amounts, the counts are identical.

stated that the five persons accused did attempt to evade taxes *by*:

> ". . . preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc., at Houston, Texas for the calendar year of 1951, which was filed on or about April 16, 1952 with the Collector of Internal Revenue for the First Internal Revenue District at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1951 was the sum of $399,135.98, and that the total amount of tax due thereon was the sum of $194,482.66, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1951 was the sum of $763,599.62 upon which said net income the corporation owed to the United States of America a total tax of $482,278.96. . . ." (R. 2).

There is absolutely no charge that the corporation owed more taxes than it paid for the year. Nowhere is it stated how much tax the corporation *paid* for or during the year. It is stated that the accused persons (all five of them) did prepare and mail *a* return, but there is no charge that it was the only return and there is no charge that the corporation paid only the amount shown on the return. At best, the above language is a mere recital. Most certainly it does not constitute the *direct, express and unambiguous* charge of the essential element of a tax deficiency that is necessary. As held by this Court in *United States* v. *Hess*, 124 U.S. 483, 486 (1888):

> ". . . No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially, or by way of recital."

Accord, *Harris* v. *United States*, 104 F. 2d 41, 45 (8 Cir. 1939); *Asgill* v. *United States*, 60 F. 2d 780, 784 (4 Cir. 1932).

The indictment in question may be read and read again, but no charge of a tax deficiency will be found therein. Indeed, for the reasons discussed above, such charge is not made in the indictment even by way of inference or recital.

(b) The substantive counts fail to charge that the accused had knowledge of a tax deficiency.

Not only does the indictment fail to charge existence of a tax deficiency, but, by the same token, it also fails to charge that the accused *knew* there was a tax deficiency. This is a fatal defect. *Ingram* v. *United States*, 360 U.S. 672 (1959); cf. *Pettibone* v. *United States*, 148 U.S. 197 (1893); *United States* v. *Carll*, 105 U.S. 611 (1882). In *Ingram* this Court reversed the convictions of two defendants charged with conspiracy to violate Section 7201, Int. Rev. Code of 1954, by attempting to evade taxes of another. The reversal was upon the ground that knowledge of the tax liability, and that it had not been paid, was an essential element of the substantive offense, and that such knowledge was not established by the evidence.

The indictment alleges that the accused "mailed" a return showing a stated amount of tax,

> ". . . whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1951 was the sum of $763,599.62 upon which said net income the corporation owed to the United States of America a total tax of $482,278.96. . . ." (R. 2).

However, it is not stated that the accused *knew* that the recited tax had not been paid. It is certainly not stated that they knew the correct tax would not be paid when due, so

as to create a tax deficiency. The lack of such a charge represents omission of an essential element and renders the indictment insufficient to charge an offense.

Closely related to the absence of a charge of knowledge of a tax deficiency is the generality of the accusation of criminal intent. The indictment merely follows the terms of the statute, alleging that the accused "wilfully" attempted to evade and defeat part of the corporate taxes (R. 2). As used in Section 145(b), Int. Rev. Code of 1939, and Section 7201, Int. Rev. Code of 1954, "willfully" means a specific intent involving evil motive, bad purpose or corrupt design; a specific intent to defraud the United States. *Abdul* v. *United States*, 254 F. 2d 292, 293 (9 Cir. 1958); *Wilson* v. *United States*, 250 F. 2d 312, 319 (9 Cir. 1957); *Wardlaw* v. *United States*, 203 F. 2d 884, 887 (5 Cir. 1953). However, the term "willful" in itself has no fixed meaning — it is a term of many meanings. *Spies* v. *United States*, 317 U.S. 492, 497 (1943).

Therefore, we submit that by merely following the terms of the statute and alleging that the accused acted "wilfully," without further charging the requisite intent, the indictment fails to sufficiently charge an essential element of the offense and is invalid. Cf. *Batchelor* v. *United States*, 156 U.S. 426, 429 (1895); *United States* v. *Britton*, 107 U.S. 655, 669 (1883); *Johnson* v. *United States*, 95 F. 2d 813, 816 (4 Cir. 1938).[16]

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[16] In Elwert v. United States, 231 F. 2d 928, 931-932 (9 Cir. 1956), it was stated that a similar contention "may have merit," but the contention was rejected upon the ground that the defendant failed to show that his defense had been prejudiced. We submit that the defect is fundamental, and renders the indictment void — whether or not actual prejudice is shown.

(c) The conspiracy count fails to charge the basic elements of the substantive offense.

We recognize that, in an indictment for conspiring to commit an offense, it is not necessary to allege with "technical precision" each element of the crime which is the object of the conspiracy, or to state such object with the detail which is required in an indictment for committing the substantive offense. *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927). However, it seems well settled that an indictment for conspiracy must, at least briefly, charge every essential element of the substantive crime in order to state an offense. *Wishart* v. *United States*, 29 F. 2d 103, 106-107 (8 Cir. 1928); *Middlebrooks* v. *United States*, 23 F. 2d 244 (5 Cir. 1928); *Brown* v. *United States*, 21 F. 2d 827 (5 Cir. 1927); *U. S.* v. *Carthon*, 125 F. Supp. 419, 423 (M.D.Ga. 1954); accord, *Robinson* v. *United States*, 263 F. 2d 911 (10 Cir. 1959); *United States* v. *Calhoun*, 257 F. 2d 673, 680 (7 Cir. 1958). Unless a conspiracy indictment sets out the elements of the substantive offense, it fails to show that the object of the conspiracy is an offense against the United States and is fatally defective. See *Pettibone* v. *United States*, 148 U.S. 197 (1893).

The conspiracy count of the instant indictment (R. 6) utterly fails to charge two essential elements of the offense of attempted tax evasion. It fails to charge (1) existence of a tax deficiency, and (2) knowledge of existence of a tax deficiency on the part of the accused. These essential elements of the offense could not possibly be said to be charged by Count 5 — not even by implication. The count fails to contain the slightest reference to a tax deficiency, or knowledge thereof by the accused.

In effect, Count 5 alleges only that the accused did "conspire to commit offenses against the United States." By

wholly omitting basic elements of the offenses alleged to be the object of the conspiracy, the conspiracy count fails to state an offense. See *United States* v. *Deutsch*, 243 F. 2d 435, 436 (3 Cir. 1957); *Hamner* v. *United States*, 134 F. 2d 592, 594-595 (5 Cir. 1943).

2. The indictment wholly fails to apprise the accused employees of the "nature and cause of the accusation" of attempted evasion of corporate income taxes within the meaning of the Sixth Amendment.

The short-form indictment (R. 1-10) before this Court is woefully lacking in facts. In substance it merely follows the statutory definition of the offense, and it contains only generalities and conclusions. We submit that the indictment does not comply with the mandate of the Sixth Amendment to the Constitution of the United States. It does not meet the tests laid down by this Court in many cases, such as *United States* v. *Cruikshank*, 92 U.S. 542, 557-558 (1876):

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI . . . It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, —it must descend to particulars.' 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this,

facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

Accord, *Keck* v. *United States*, 172 U.S. 434, 437 (1899), and cases therein cited.

(a) The indictment does not set out the particulars of the alleged "attempt to evade and defeat" corporate taxes.

While perhaps an indictment in the general words of the statute might suffice when an individual is charged with attempting to evade his own personal income taxes, different considerations are clearly applicable to a charge of attempted evasion of *corporate* taxes. In a case of personal tax evasion it could be argued with force that the indictment need not descend to particulars, since each taxpayer knows what his own income is and has the duty to assess his own income taxes. However, such reasoning cannot be applied to a case of attempted evasion of taxes imposed upon a corporation. No corporate officer or employee is necessarily in a position to know what the income of the corporation is, and the statute does not charge any *particular* officer or employee with the duty of filing a return on behalf of the corporation. Int. Rev. Code of 1954, §6012.

Petitioners were accused of attempting to evade taxes imposed upon a rather large corporation of which they were officer-employees. This corporation handled tens of millions of dollars in business each year, necessitating thousands of transactions, and it had hundreds of employees (see R.B. 115). Under these circumstances, the vague and general allegations of the indictment are wholly insufficient. As a practical matter, the indictment simply

does not inform the accused persons of the charge against them, so that they might prepare to defend themselves. This seems especially true in light of the principle that the accused employees were presumed innocent of any offense. The indictment is clearly insufficient to comply with the Fifth and Sixth Amendments. Cf. *United States* v. *Hess* 124 U.S. 483 (1888); *Lowenburg* v. *United States*, 156 F. 2d 22 (10 Cir. 1946); *Skelley* v. *United States*, 37 F. 2d 503 (10 Cir. 1930); *Jarl* v. *United States*, 19 F. 2d 891 (8 Cir. 1927); *Boykin* v. *United States*, 11 F. 2d 484 (5 Cir. 1926); *Etheredge* v. *United States*, 186 Fed. 434 (5 Cir. 1911).

The allegation that the accused "did wilfully and knowingly attempt to evade and defeat taxes" is grossly inadequate. To be valid the indictment would have to charge the basic particulars of the attempted evasion alleged; it would have to charge *how* the attempt was made in reasonable detail. In point are the cases holding that, in an indictment for misapplying the funds of a national bank, it is not sufficient to allege that the defendant "willfully misapplied" the funds, but that facts must be alleged showing *how* the misapplication was made, and that it was an unlawful one. *Batchelor* v. *United States*, 156 U.S. 426 (1895); *United States* v. *Britton*, 107 U.S. 655 (1883); *Johnson* v. *United States*, 95 F. 2d 813 (4 Cir. 1938); *United States* v. *Cawthon*, 125 F. Supp. 419 (M.D.Ga. 1954).

The statements in the substantive counts (R. 1-6) that the accused attempted to evade taxes by "falsifying and altering" invoices and other records, "concealing" assets, "diverting" income, etc., are manifestly insufficient to salvage the indictment. Those allegations mean nothing, as it is not shown how such actions did, or could, result in an underpayment of tax by the corporation. The same is true with respect to the allegations in parts A-D of Count 5 that "it was a part of said conspiracy" to do various things (R. 7).

How could "falsifying invoices" result in a tax deficiency? By showing an expenditure to be for one thing when it was in fact for something else, perhaps? That could contribute to a tax deficiency only if one type of expediture were tax-deductible whereas the other type was not — but no such charge appears in the indictment. It cannot be imagined how "concealing assets" could result in a tax deficiency. Diversion of income from the corporation could not cause a tax deficiency on its part unless the diversion constituted a dividend — but it is not charged what the diversions constituted. If such diverted income represented additional compensation paid to the recipients, or other expense, or if it were an unauthorized theft, the corporation would be entitled to a tax deduction for the amounts diverted, with the result that such diversions would not cause the corporation to owe any more tax. Any connection between the acts alleged and an understatement of taxable income can be based only upon pure conjecture — it does not appear in the indictment.

(b) The indictment does not set out the particulars of the alleged falsity of the tax returns.

The allegation that one of the means of the attempted evasion was by "preparing and causing to be prepared, and mailing and causing to be mailed" a "false and fraudulent corporate income tax return," is not sufficient to inform the accused of the nature and cause of the accusation. It is a mere conclusion. Note that the accused are not charged with *filing* the return, and it is not even stated *to whom* it was "mailed." The further allegation that the net income of the corporation was so much, upon which income it owed a tax of so much, is also nothing but a conclusion of the pleader. Conclusions will not suffice; they add nothing to the indictment. *Clay* v. *United States*, 218 F. 2d 483, 486 (5 Cir. 1955).

It is required that *facts* be set out which, if proven, would show the falsity of the return. Cf. *Babb* v. *United States*, 218 F. 2d 538, 541 (5 Cir. 1955). At a minimum, we submit that the indictment would have to state which entries on the return are alleged to be false. In *United States* v. *Demos*, 291 Fed. 104 (S.D. Fla. 1923), which apparently was the first case to consider a tax evasion indictment, the indictment was held to be insufficient by reason of the very defects of which we complain.[17]

(c) The indictment does not charge what part the accused individually had in the alleged "attempt to evade and defeat" taxes.

Want of particularity such as is found in this indictment would be fatal if it purported to charge *only one* defendant. But here the violation of constitutional safeguards is flagrant. The indictment attempts to charge *five different individuals*, and it in no way distinguishes the accusations against any one individual from the accusations against the others. As a consequence, each of the accused is left with no clue as to the charges against which *he* must be prepared to defend. The blanket, "shotgun" approach of the pleading renders it preposterous on its face. For example, is it possible that *all five* of the persons "mailed" *a* return, as alleged?

We submit that, in order to afford any real protection, the Sixth Amendment must be construed to entitle *each* person charged in an indictment to a statement of the accusations against him *individually*.

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[17] The only tax case found which cited Demos is Janko v. United States, 281 F. 2d 156, 161 (8 Cir. 1960), which distinguished it.

III.

Contrary to the Sixth Amendment Petitioners were tried in absentia. By basing the convictions and sentences upon evidence adduced at the Farnsworth trial, the District Court rejected the pleas of nolo contendere and lost jurisdiction to convict and sentence Petitioners upon such pleas.

Contrary to the Sixth Amendment Petitioners in practical effect were tried *in absentia*. They were neither present nor represented at the Farnsworth trial, were not parties to it and were not confronted with the witnesses against them. Evidence against them was received without benefit of cross-examination or rebuttal evidence on their behalf. Petitioners believe that the record leaves the inescapable inference that they were convicted and sentenced upon the basis of evidence adduced at the Farnsworth trial — rather than upon their *nolo contendere* pleas. This action constituted a rejection of Petitioners' pleas of *nolo contendere* as a matter of law; accordingly, the trial court lost jurisdiction to convict and sentence upon such pleas.

The testimony adduced in the ten week long Farnsworth trial was not restricted to the two Farnsworths being tried. The Government was permitted, because of the blanket charges of conspiracy, to introduce a large quantity of evidence relating to Petitioners. It was heard by the District Court without benefit of the traditional safeguards of cross-examination or rebuttal testimony on Petitioners' behalf.

Following rearraignment on March 17 and 20, 1959 (R. 29, 41), Petitioners were not called for sentencing until June 19, 1959 (after the lengthy Farnsworth trial had ended in failure and frustration for the Government). This was contrary to the command of Rule 32(a) that "Sentence shall be imposed without unreasonable delay." Under the circumstances this delay was "purposeful [and] oppressive". Cf. *Pollard* v. *United States*, 352 U.S. 354,

361 (1957). On the day of sentencing, the proceedings were confined to the statements of counsel and certain character witnesses, and statements by Petitioners Blocker and Lott (R. 41-61). The pertinent dialogue is set forth below.

> (The Court): "Does the Government have anything to say to the Court at this time before I call on the defendants to tell me whatever they want to say or their lawyers or friends want to tell me in their behalf?
>
> (Mr. Schwartz): Your Honor, I believe the Court has heard the facts tried following these gentlemen's pleas" (R. 42).

Counsel for Blocker referred to evidence which had been adduced at the trial of the Farnsworths. The court clearly demonstrated its complete familiarity with the facts adduced at that trial (R. 46-47):

> (Counsel): "I know what exactly was testified, in substance . . . that was their business, they were representing their respective clients, but one seemed to me to be emphasizing a good deal about one of my clients, and that other —
>
> (The Court): That would be Mr. Blocker?
>
> (Counsel): Yes, it would. . . ."

Again (R. 51):

> (Mr. Lott): "Judge, I realize that I have made a great mistake and that I should have had the courage to have gotten out in 1953 when some of the younger fellows did.
>
> (The Court): That could be the first statement of remorse or repentence that I have heard during these last eleven weeks."

Finally, it appears that the court again made reference to the testimony adduced at the trial of the Farnsworths

following the testimony of the last character witness for Lott (R. 59):

> Q. "Will you tell Judge Hannay what your estimate of Mr. Lott is with respect to honesty, fairness and being a law-abiding citizen?
>
> A. Your Honor, I consider him one of the finest men I have ever known.
>
> • • •
>
> (The Witness): I would like to say that every member of our congregation would come here as a witness in his behalf, and they would say he is one of the cleanest Christian men we have ever known.
>
> (The Court): But none of them were present during the ten weeks of testimony, were they?
>
> (The Witness): Not that I know of, sir."

At the conclusion of these proceedings, and after the noon recess, Petitioners were sentenced orally by the court, commencing as follows (R. 60):

> "I have found each [defendant] guilty of the felonies as contained in the Grand Jury indictment."

Petitioners believe that, when the above statements of the District Court are considered in connection with the results of the Farnsworth trial, the record leaves the inescapable inference that the court did in fact consider the guilt or innocence of Petitioners and that Petitioners were convicted and sentenced upon the basis of evidence adduced at the Farnsworth trial — rather than upon their *nolo contendere* pleas. It would have been impossible for the court to have excluded from its mind the testimony relating to Petitioners which was adduced in the Farnsworth trial.

The error committed is clear: in practical effect, Petitioners were tried *in absentia*. The District Court made its

independent judgment of conviction that Petitioners were guilty as charged and imposed its sentence upon them, not upon the basis of their pleas of *nolo contendere*, but upon the evidence heard in the Farnsworth trial. Under these facts the judgment and sentence of the court cannot stand.

Of course, the District Court did not state for the record that its judgment and sentence were based solely upon the evidence heard and considered during the Farnsworth trial. But neither, on the other hand, did it state for the record that the Farnsworth evidence had been heard "for the limited purpose" of determining what sentence, if any, ought to be imposed upon Petitioners. We are confronted with the record unavoidably inadequate. The evidence heard by the court during the Farnsworth trial is not in the record. But, in view of the recited "finding of guilty" by the court (R. 60) and the fact that the court deferred sentencing and heard the Farnsworth evidence without indicating that it was to be considered solely for the information of the court in passing sentence upon Petitioners, "no presumption can be indulged, in the light of the various recitals . . . that the evidence was received otherwise than for the purpose of the finding, upon which the judgment appears to be pronounced. . . . The record, therefore, furnishes no ground to support the judgment as resting on acceptance of the plea [*nolo contendere*] . . . thus leaving it unsupported for want of either of the authorized pleas to the indictment." *Tucker* v. *United States*, 196 Fed. 260, 268 (7 Cir. 1912).

Origin and Meaning of Plea of Nolo Contendere

The plea of *nolo contendere* exists because it is useful in the administration of criminal justice. It is a highly technical plea. Since its meaning and consequences are not free from doubt, a review of its origin and historical develop-

ment seems appropriate. It has been referred to variously as being "a confession", "an implied confession", "a quasi confession of guilt", "a plea of guilty", "substantially, though not technically, a plea of guilty", "a conditional plea of guilty", "a substitute for a plea of guilty", "a gentleman's plea of guilty"; "a mild form of a plea of guilty", "a compromise between the government and the defendant", "an agreement on the part of the defendant that the facts charged may be considered as true for the purposes of the case", *ad infinitum*. *Annot.*, 152 A.L.R. 253, 256-258 (1944).

Nolo contendere appeared as early as the reign of Henry IV (1399-1413). 2 Hawkins, *Pleas of the Crown* 466 (8th ed. 1824). Chitty's definition and explanation of *nolo contendere* is as follows:

> "An implied confession is where, in a case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the king's mercy, and desiring to submit to a small fine, which the court may either accept or decline, as they think proper. If they grant the request, an entry is made to this effect, that the defendant 'non vult contendere cum domina regina et posuit se in gratiam curiae,' without compelling him to a more direct confession. The difference in effect between an implied and an express confession is that, after the latter, not guilty cannot be pleaded to an action of trespass for the same injury; whereas it may at any time be done after the former. But no confession, however large and explicit, will prevent the defendant from taking exceptions in arrest of judgment to faults apparent in the record; for the judges must ex officio take notice of them, and anyone, as amicus curiae, may point out the exceptions." 1 Chitty, *Criminal Law* 430 (1819 ed.).[18]

Bishop, an American authority, makes the additional comment that "It [*nolo contendere*] simply justifies the court

[18] As quoted in Tucker v. United States, 196 Fed. 260, 263 (7 Cir. 1912).

in imposing sentence". 2 Bishop, *New Criminal Procedure*, §25 (2d ed. 1913).

In the United States an almost hopeless conflict of judicial authority has developed as to whether *nolo contendere* has application in felony cases; whether imprisonment can be imposed after it has been accepted; or whether maximum penalties can be so imposed. See Lenvin and Meyers, *Nolo Contendere: Its Nature and Implications*, 51 Yale L. J. 1255 (1942); *Annot.*, 152 A.L.R. 253 (1944). There are some principles, however, upon which our courts have ruled in virtual unanimity: (1) state and federal decisions are in agreement that *nolo contendere* cannot be entered by the defendant as a matter of right, and that its acceptance by the court is entirely a matter of grace, or discretion;[19] (2) once *nolo contendere* has been accepted, it is discretionary with the court whether it may be withdrawn and replaced by a plea of guilty or not guilty.[20] The unique utility of *nolo contendere* is that it fits a situation in which the demands of public policy and the requirements of justice can be satisfied by disposition of the case without contest or adjudication of the issues arising under the indictment.

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[19] Hudson v. United States, 272 U.S. 451 (1926); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D.C. Minn. 1939); United States v. Socony-Vacuum Oil Co., 23 F. Supp. 531 (W.D. Wis. 1938); Commonwealth v. Ingersoll, 145 Mass. 381, 14 N.E. 449 (1888); Commonwealth v. Horton, 26 Mass. 206 (1829); Williams v. State, 130 Miss. 827, 94 So. 882 (1923); State v. Martin, 92 N.J.L. 436, 106 Atl. 385 (Ct. Errors and App. 1919); McNab v. State, 42 Wyo. 396, 295 Pac. 278 (1931).

[20] United States v. Norris, 281 U.S. 619 (1930); Farnsworth v. Zerbst, 97 F. 2d 255 (5 Cir. 1938); United States v. Anthracite Brewing Co., 11 F. Supp. 1018 (M.D. Pa. 1934); Commonwealth v. Marino, 254 Mass. 533, 150 N.E. 841 (1926); State v. Siddall, 103 Me. 144, 68 Atl. 634 (1907); *In re* Lanni, 47 R.I. 158, 131 Atl. 52 (1925).

Nolo contendere is not a plea of guilty in the case. Rule 11 plainly gives the defendant the choice of three pleas: (1) not guilty (2) guilty or (3), with the consent of the court, *nolo contendere*.

The distinction between the pleas of guilty and *nolo contendere* is stated by the California District Court of Appeals in *Caminetti* v. *Imperial Mut. Life Ins. Co.*, 139 P. 2d 681, 689 (1943), as follows:

> ". . . The existence in the law of the two pleas, i.e., guilty and nolo contendere, is indicative of the fact that there is some distinction or difference between them. Undoubtedly the plea of nolo contendere is often used as a substitute for a plea of guilty but it amounts only to a declaration by the defendant that he will not contend. It has been held not to be a confession of guilt. Barker v. Almy, 20 R.I. 367, 39 A. 185. It is uniformly held that such a plea cannot be used against the defendant as an admission in any civil suit for the same act. Manifestly, if a plea of nolo contendere has the same effect as a plea of guilty, viz., admitting the charge, then it differs in no respect from a plea of guilty. Buck v. Commonwealth, 107 Pa. 486, 489. Tucker v. United States, 7 Cir., 196 F. 260, 41 L.R.A., N.S., 70, is authority for the statement that the plea of nolo contendere is in fact a confession on which a defendant may be sentenced in a particular prosecution, and as the plea is limited to that particular case, such conviction cannot be used in another proceeding to discredit the witness; then in State v. Suick, 195 Wis. 175, 217 N.W. 743, 744, we find the following: 'The plea of nolo contendere is an implied confession. Judgment of conviction follows such a plea as a matter of course, yet the plea itself contains no admissions which can be used against the defendant in another action.' *Strictly speaking, therefore, the plea of nolo contendere amounts only to an agreement on the part of the defendant that the fact charged may be considered as true for the purposes of*

the particular case wherein it is entered. 31 A.L.R. 278. A plea of nolo contendere, while an implied, is not a conclusive confession of guilt. By entering the plea the defendant does not confess or acknowledge the charge against him, as upon a plea of guilty. Doughty v. De Amoreel, 22 R.I. 158, 46 A. 838; State v. LaRose, 71 N.H. 435, 52 A. 943; White v. Creamer, 175 Mass. 567, 56 N.E. 832." (Emphasis supplied.)

In addition, recent federal decisions establish that, unlike the pleas of guilty or not guilty, *nolo contendere* is not a plea to the indictment at all; it is "but a statement that the defendant will not contend against the charge made by the Government . . . ." *United States* v. *Jones*, 119 F. Supp. 288, 290 (S.D. Cal. 1954). As the Court of Appeals for the Fifth Circuit has repeatedly and correctly stated, "nolo contendere is a mere statement of unwillingness to contest and no more." *Mickler* v. *Fahs*, 243 F. 2d 515, 517 (5 Cir. 1957); accord, *Piassick* v. *United States*, 253 F. 2d 658, 661 (5 Cir. 1958).

The distinction between the pleas of guilty and *nolo contendere* is sound. When the accused's *nolo contendere* is accepted by the court, there comes into existence a mutual agreement not to adjudicate the issues as to the accused's guilt or innocence. The conviction obtains by agreement, based upon public policy, rather than upon a judicial determination of guilt, and the court consequently acquires jurisdictional power to enter judgment and sentence. *United States* v. *Gallagher*, 94 F. Supp. 640 (W.D. Pa. 1950). Adjudication of the issue of guilt is not authorized because the agreement not to contest does not establish the matter of guilt at all, except by inference which may or may not be correct. In fact, the courts have noted a number of reasons having no bearing upon the merits which might prompt the accused to tender a plea of *nolo contendere*: (1) to save

expenses of trial and avoid notoriety,[21] (2) to avoid unpleasant publicity,[22] (3) to avoid a hostile jury,[23] or (4) to avoid a contest obviously hopeless because of lack of witnesses.[24]

Nolo contendere, an agreement not to contest, is not a "plea in the strict sense" at all, *Fidelity-Phenix Fire Ins. Co.* v. *Murphy*, 235 Ala. 680, 166 So. 604, 609 (1936); rather it is a plea to the court, an offer to submit to judgment and sentence which may be accepted or refused. "The motion [*nolo contendere*] is decided on public policy considerations." *United States* v. *Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 174 (S.D. N.Y. 1955). *Ultramarine* was an anti-trust suit; the enumerated grounds upon which the plea of *nolo contendere* was rejected were as follows: "The nature of the claimed violations; how long persisted in; the size and power of the defendants in the particular industry; the impact of the condemned conduct upon the economy; whether a greater deterrent effect will result from conviction rather than from acceptance of the plea," and the views of the Attorney General, as chief enforcement officer of the anti-trust laws. 137 F. Supp. at 172.

Conclusion of Argument Under Point

The above historical development and analysis of the plea of *nolo contendere* is consistent with this Court's holding in *United States* v. *Norris*, 281 U.S. 619 (1930), wherein it was squarely held that after the plea of *nolo contendere* has been received, nothing remains for the court to do but to render judgment and sentence, as no issue of fact exists and

[21] Lafferty v. Houlihan, 81 N.H. 67, 121 Atl. 92 (1923).

[22] *In re* Smith, 365 Ill. 11, 5 N.E. 2d 227 (1936).

[23] People *ex rel.* Atty. Gen. v. Edison, 100 Colo. 574, 69 P. 2d 246 (1937).

[24] Doughty v. De Amoreel, 22 R.I. 158, 46 Atl. 838 (1900).

none can be made while the plea remains of record. In *Norris*, a judgment of conviction and sentence entered pursuant to the defendant's plea of *nolo contendere* was affirmed. The District Court, having received the defendant's plea, thereafter received evidence in the form of a stipulation of facts, which, if considered, would have established as a matter of law that the defendant was innocent of the conspiracy charged in the indictment. The stipulation was received with the express limitation that it was to be treated as "evidence . . . for the information of the Court in determining what sentence, if any, ought to be imposed on the defendant Norris." The stipulation was made a part of the record "for the limited purposes above stated." The District Court declined to consider the effect of the stipulation upon the merits, entered its judgment of conviction and imposed its sentence upon the defendant. The Court of Appeals reversed the conviction, but this Court set that decision aside and affirmed the judgment and sentence of the District Court on these grounds:

> ". . . After the plea [*nolo contendere*], nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record." 281 U.S. at 623.

Norris clearly establishes the law to be that the plea of *nolo contendere*, although a proper basis for entry of judgment of conviction and imposition of sentence, is not a proper basis upon which to make an adjudication of any fact issue as to the defendant's guilt or innocence. The plain effect of this decision is that after *nolo contendere* is received, the question of guilt is no longer an appropriate subject matter for judicial determination. By the same token, if the court does receive evidence upon the issues of guilt after having accepted the *nolo* plea, the "agreement not to contest" is breached; *by implication the court rejects the plea it previously received.*

The Superior Court of Pennsylvania in *Commonwealth* v. *Rousch*, 172 Atl. 484 (1934), reversed and remanded a judgment of conviction and sentence upon the ground that the trial court, after expressly receiving the defendant's plea of *nolo contendere*, then proceeded to determine the issues as to his guilt upon the basis of evidence presented in the course of a "trial". In receiving the defendant's plea, the trial court had expressly stated that he would "sit as a jury and . . . hear both sides." In reversing the case, the Superior Court ruled as follows:

> "When a plea of nolo contendere is entered and accepted, it is not the province of the judge to adjudge the defendant guilty or not guilty. Evidence is heard only to aid the judge in fixing the sentence. . . .
>
> "• • •
>
> "The trial judge could not assume or accept the authority attempted to be given him to 'sit as a jury and hear both sides,' to find the defendant guilty on the law and the facts, and impose sentence, not on the plea, but on his findings. As there seems to have been a mutual misunderstanding between counsel and the trial judge as to his jurisdiction, and as the plea of nolo contendere was not accepted without qualification, this case must be returned for a trial in accordance with law, viz. trial by a jury unless a plea is entered and accepted. The defendant will, of course, not be prejudiced by the unaccepted plea." 172 Atl. at 485.

Under similar facts, the federal courts have reached the same conclusion. Thus, in the important case of *Tucker* v. *United States*, 196 Fed. 260, 268 (7 Cir. 1912), the Court of Appeals concluded as follows:[25]

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[25] The holding of the Tucker case that sentence of imprisonment cannot be had under *nolo contendere* was expressly overruled in Hudson v. U.S., 272 U.S. 451 (1926); but its holding that rejection of the plea may be inferred from the fact that evidence was received by the trial court remains intact.

"That these proceedings and recitals leading up to the judgment are inconsistent with acceptance of the nolo contendere plea as tendered must be presumed, as we believe, under either of the contentions for interpretation of the rule. It may be that evidence may be heard under such plea for the purpose of determining the amount of fine to be imposed, but no issue is presented for trial under the indictment, and no adjudication of guilt is authorized. [Citations omitted.] The evidence referred to in the record is not preserved, but no presumption can be indulged, in the light of the various recitals, with no acceptance of the plea mentioned, that the evidence was received otherwise than for the purpose of the finding, upon which the judgment appears to be pronounced. Moreover, the judgment is alike inconsistent with acceptance of the plea, as above defined, in pronouncing imprisonment in the penitentiary for 18 months. The record, therefore, furnishes no ground to support the judgment as resting on acceptance of the plea [citation omitted], thus leaving it unsupported for want of either of the authorized pleas to the indictment.

"The judgment of the district court is reversed, accordingly, and the cause is remanded, with direction either to accept or refuse acceptance of such plea as tendered, and proceed thereupon in conformity with law."

In this case the District Court, by hearing evidence in the Farnsworth trial and relating that evidence to Petitioners, as it obviously did during the sentencing proceedings, engaged in precisely that sort of conduct which amounts in law to a rejection of the pleas of *nolo contendere*. In so doing, the court lost jurisdiction to enter judgment and sentence upon the pleas.

It is no answer to say that the District Court committed harmless error if it did in fact "try" or reach an independent adjudication or decision as to Petitioners' guilt.

It is fundamental that, in the absence of a valid consent, a federal court cannot proceed with the trial of an accused without a jury; not because a jury is necessary to its jurisdiction, but because the accused is entitled by the terms of the Constitution to that mode of trial. *Patton v. United States*, 281 U.S. 276, 299 (1930). *Nolo contendere* is not a waiver or consent to be tried by the court.

If our position is correct, how then is the trial court to proceed in determining the appropriate sentence? The answer to this question is not difficult. By entering pleas of *nolo contendere*, the defendants for purposes of sentencing indirectly admit the truth of all matters contained in the indictment. In addition to the indictment, the District Court in this case had at its disposal certain presentence investigation reports, reference to which is authorized by the Federal Rules of Criminal Procedure (R. 29, 41). Fed. R. Crim. P. 32(c). In the exercise of its broad discretion, the District Court should have had no difficulty in determining the appropriate sentences, upon the basis of the type of offense named in the indictment and the presentence reports. If the case were one in which the court felt that the short-form indictment was so insufficient in its particulars as to leave the court in doubt as to the extent of the defendants' participation, it could have declined to accept Petitioners' pleas of *nolo contendere*.

The denial of Petitioners' motions for a bill of particulars (R. 15) clearly indicates that the District Court was of the opinion that the indictment in this case was sufficient in its particulars. Therefore, we are left to speculate as to why the court was unable to enter judgment of conviction and impose sentence upon Petitioners until such time as it had heard and considered the evidence adduced at the Farnsworth trial. The reasons for this delay are not revealed by the record. Certainly, reasonable minds may differ as to

why the District Court found such delay to be appropriate in this case. But we are concerned with a matter of criminal pleading and practice, an area of the law which has been characterized as demanding the "utmost circumspection" in courts charged with the administration of criminal justice. *United States* v. *Shneer*, 194 F. 2d 598, 602 (3 Cir. 1952). If the record in this case reflects any circumstances raising reasonable doubt as to whether Petitioners were prejudiced by the delay, or by the fact that the court received and considered evidence as to their guilt during the Farnsworth trial, such doubt should be resolved in favor of Petitioners. In matters of criminal pleading and procedure, where life and liberty are at stake, there is no room for speculation as to whether an accused may have been prejudiced through some departure from our carefully formulated system of substantive and procedural safeguards.

The Government contended below that even if the District Court did consider the evidence adduced in the Farnsworth trial in sentencing Petitioners, it was perfectly proper that it do so. That contention is wrong — if it were sustained, the necessary conequences would be to impart new meaning to the *nolo contendere* procedure and practice as heretofore existing in our criminal jurisprudence. Such a holding would establish a process in the criminal law whereby the courts, without receiving the accused's plea to the indictment, could proceed to try the accused or to hear evidence as to his guilt or innocence presented in the course of some other trial, without permitting the accused to cross-examine the witnesses or to produce rebuttal evidence, and without benefit of a jury could adjudicate his rights and impose punishment summarily. This Court, in the discharge of its duties and responsibilities in supervising the administration of the criminal law, should not permit such a result to obtain.

In legal effect, Petitioners' pleas of *nolo contendere* were rejected by the trial court; accordingly, there are no pleas presently outstanding. This Court should, at the very least, remand the case to the District Court with instructions that Petitioners be allowed to plead to the indictment and that proceedings thereafter be had in accordance with law.

IV.

Since the written judgments adjudged that Petitioners were convicted of misdemeanor offenses, imposition of prison sentences for felony offenses was beyond the jurisdiction of the District Court.

The indictment purports to charge Petitioners with the *felonies* of willfully attempting to evade and defeat corporate taxes, and conspiracy to do so (R. 1-10). However, the written judgments seem to adjudge them guilty of misdemeanor offenses. Although the judgments refer to the felony statutes, they expressly state that (R. 61-62, 63, 65):

> . . . "It is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of *filing false and fraudulent corporate income tax returns* . . . and the offense of conspiring to *file false and fraudulent corporate income tax returns* . . . ." (Emphasis supplied.)

The italicized language describes the misdemeanor offense proscribed by Sections 7203 and 7207, Int. Rev. Code of 1954, and Section 145(a), Int. Rev. Code of 1939. These misdemeanor offenses are lesser offenses included within the felony charges. Under Rule 31(c) it was within the authority of the District Court to so convict Petitioners of the lesser included offenses.

Sections 7203, 7207 and 145(a) each provides a maximum imprisonment of one year, and, under 18 U.S.C. §371, conspiracy to commit a misdemeanor subjects the offender to no more than the maximum punishment provided for the

misdemeanor. Therefore, we submit that the sentences imposed upon Petitioners (3 years on each count in the case of Blocker and 2 years each in the cases of Lott and Frazier) were excessive. The excessive portions should be remitted by this Court under Rule 35.

A very similar situation was presented in *United States* v. *McCue*, 160 F. Supp. 595 (D.C. Conn. 1958). In that case the defendant was charged with violating Section 145(b), the felony statute. He entered a plea of *nolo contendere* and was convicted by the District Court of violating Section 145(a), the misdemeanor statute, under Rule 31(c). After a searching analysis of this Court's decisions in *Spies* v. *United States*, 317 U.S. 492 (1943), *Berra* v. *United States*, 351 U.S. 131 (1956), and *Achilli* v. *United States*, 353 U.S. 373 (1957), and finding no contrary authority in the courts of appeals, the District Court concluded that the 145(a) misdemeanor is necessarily a lesser offense included within the felony charge of violating 145(b) by filing a false return. It was pointed out that commission of the felony necessarily involves a failure to supply correct information in violation of 145(a). The same reasoning is applicable to Sections 7201 and 7203, the 1954 Code counterparts of 145(b) and 145(a). That Section 7207 is also a lesser offense included within a 7201 charge seems obvious.[26]

We submit that the formal adjudications of guilt of misdemeanor offenses cannot be dismissed as "clerical mistakes" which may be corrected by the court at any time under Rule 36. These written judgments contain everything called for by Rule 32(b), which plainly contemplates a written judgment, and they are sufficient in every respect

[26] In Janko v. United States, 281 F. 2d 156 (8 Cir. 1960), the majority held that Section 7207 is not applicable to income tax offenses. We respectfully submit that the view of the dissenting judge is correct.

to constitute convictions of misdemeanor offenses. The references to Sections 145(b) and 7201 may be deemed superfluous. The only "mistakes" which appear in the judgments are the *excessive sentences*. The oral statement of the judge, that "I have found each guilty of the felonies as contained in the Grand Jury indictment" (R. 60), is not controlling. It would appear incongruous for such an oral statement in open court to be construed so as to change the *formal judgments* which were subsequently entered. Cf. *United States* v. *Hark*, 320 U.S. 531, 534-535 (1944), in which this Court held:

> " . . . Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry . . . ."

CONCLUSION

WHEREFORE, Petitioners respectfully pray that the judgment of the Court of Appeals be reversed, and that the judgments and sentences be set aside and the indictment be dismissed; or, in the alternative, that the judgments and sentences be set aside and the cause be remanded to the District Court with instructions that Petitioners be permitted to replead to the indictment; or, in the further alternative, that this Court enter an order remitting the excessive portions of the sentences.

Respectfully submitted,

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December, 1960

APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

CONSTITUTION OF THE UNITED STATES

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTERNAL REVENUE CODE OF 1939

Sec. 145. Penalties.

(a) Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations

made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution. (53 Stat. 62, as amended, 57 Stat. 144.)

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (53 Stat. 62.)

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INTERNAL REVENUE CODE OF 1954

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (68A Stat. 851.)

Sec. 7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (68A Stat. 851.)

Sec. 7207. Fraudulent Returns, Statements, or Other Documents.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. (68A Stat. 853.)

UNITED STATES CODE

Title 18

Sec. 371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not

more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (62 Stat. 701.)

Title 28

Sec. 2255. Federal Custody; Remedies on Motion Attacking Sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (62 Stat. 967, as amended, 63 Stat. 105.)

Federal Rules of Criminal Procedure

Rule 2. Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 7. The Indictment and the Information.

* * *

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated

by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

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Rule 11. Pleas.

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

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(b) The Motion Raising Defenses and Objections.

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(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial.

The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

* * *

Rule 31. Verdict.

* * *

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * *

Rule 32. Sentence and Judgment.

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to

the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) **Report.** The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) Withdrawal of Plea of Guilty: A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

Rule 34. Arrest of Judgment.

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

Rule 35. Correction or Reduction of Sentence.

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the

sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 36. Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Rule 37. Taking Appeal; and Petition for Writ of Certiorari.

(a) Taking Appeal to a Court of Appeals.

(1) Notice of Appeal. An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof

to adverse parties, but his failure so to do does not affect the validity of the appeal.

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

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Rule 45. Time.

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(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

• • •